THE REAL BODY SHOP, PART 2: SPARE PARTS

There is something morally unattractive about selling body parts, but the alternatives are worse, argues **Jeremy Shearmur**

In 2002, the Israeli doctor Michael Friedlaender published a short article in *The Lancet*, a leading British medical journal. In it, he announced his reluctant, but in the end enthusiastic, conversion to the case for legalising the sale of kidneys from live donors.[1] His reluctance seems to have related to the widespread aversion within the medical profession to the selling of body parts. His explanation for his change of mind was that in his practice in Israel as a kidney specialist, he had noted that his Arab patients—despairing of the possibility of getting a kidney, and wearying from dialysis, which is not only time-consuming, but is an inadequate replacement for kidneys—were journeying to Iraq, where they were able to get a kidney from a live donor for a relatively small sum. He found that his Jewish patients, in the face of the same problems, were also starting to turn to such medical tourism elsewhere. Friedlaender was concerned that he was in many cases left to try to remedy the defects of poor medical treatment that people had received abroad. At the same time, given the disparities in wealth between those who were in need of kidneys and those who might sell one, he saw no practicable way in which the practice would end. Also, in the light of the fact he reported that kidneys purchased from a live donor were likely to be medically superior to those obtained from corpses, and the advantages to all parties in having such transactions take place legally and in good medical conditions, he came to the view that legalising such sales would be desirable. This could ensure that organs came from people who genuinely consented to the donation, and also that the donor and the recipient received good quality medical care.

This is all of more than just academic interest: recent reports indicate that medical tourism for the purpose of obtaining transplants is growing in Australia, raising the same issues with follow-up treatment.[2] There is also a gross mismatch between the demand for organs and the supply of donations here.

British philosopher Janet Radcliffe Richards has previously endorsed legalising the sale of kidneys, criticising some objections that had been made against it.[3] Subsequently, she more positively advocated the purchase of kidneys from healthy people in Third World countries. More recently, Virginia Postrel, formerly the editor of the US

Jeremy Shearmur is a Reader in philosophy at the School of Humanities in the Australian National University's Faculty of Arts. Part 1 of this article, 'Blood and Corpses,' appeared in *Policy* 23:4 (Summer 2007/08).

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libertarian magazine *Reason*, created a stir by giving a kidney to a friend who was in need of a transplant, then going on to advocate kidney sales.[4] The case for legalising organ sales has also been taken up by think tanks such as the Cato Institute, and by *The Economist*.[5] On the philosophical side, James Stacey Taylor, in his *Stakes and Kidneys*, has set out a powerful case for kidney sales at some length.[6] He takes particular issue with arguments that have been offered against such sales on the grounds that they would compromise the autonomy of those involved in selling.

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The voices in favour of legalising organ sales have been measured and rational. Why, then, is it not more widely accepted? In part, there is what has been termed the 'yuck factor': the reaction that, while there might be a rational case for it, what is being proposed is simply too repulsive to contemplate.[7] But there are arguments that those who favour the legalised sale of kidneys have not taken sufficiently seriously. Let us look at some of these in turn.

Some problems

First, it has been claimed that those who favour the sale of kidneys have been insufficiently concerned with the problems of the commodification of the person, which involves treating people in ways that persons should not be treated.

To get a feel for the issue, let us start with an example that does not involve buying and selling. There is, it might be argued, a sense in which there is something deeply wrong with a situation—in terms of our values and the character of relationships—if, say, a wealthy middle-aged man looks at young women *solely* as objects that can satisfy his sexual desires. His very gaze upon them in this mode—feminists would argue—treats them in a way that is morally wrong. If he goes further and seeks out those most vulnerable young women who would be most likely to agree to sleep with him, or to do whatever else he had in mind, simply because of their poverty or vulnerability, is he not treating them as less than human beings? It is suggested that something similar happens when the rich but unhealthy in Western countries seek out among the world's poor those who are fit, healthy, and sufficiently desperate to be open to selling one of their kidneys. Rather than being seen as our fellow human beings, these people are instead being looked at as something less: as assemblages of parts they might be persuaded to commodify. The creation of markets in live body parts is thus argued to be dehumanising and immoral.

Second, some anthropologists—centred on Nancy Scheper-Hughes at the University of California, Berkeley—have written about some of the horrors of the current trade in human kidneys.[8] They have documented the grim details of what has been going on. There are cases where organs have been obtained from patients in mental hospitals in South America and from macho yet possibly naive men in the Philippines. Then there are the really heart-rending stories of young men from Moldova promised work in Turkey finding that when they get there they face a choice between 'selling' a kidney or ending up dead in the Bosporus. There have also been other grim tales about the sale of organs from executed prisoners, and worse, in China.[9]

Schaper-Hughes, while an academic, is also a campaigner on these issues; critics might well say that there is sometimes a note of hysteria about her work. But she does raise issues—such as those concerning human trafficking for sexual purposes—that suggest all is not well in these transactions, and that those who favour commodification need to think hard about the likely consequences of what they support. Problems about the consequences of kidney sales in India have been raised by various journalists and also by the anthropologist Lawrence Cohen.[10] The situation there is somewhat complex, but the sale of kidneys appears to have taken place legally for a while in some Indian states. There was then a somewhat blurred period in which the sales were made illegal at a national level but remained legal in some states. More recently, kidney sales appear to continue illegally in some of the areas where

they had previously been legal. The results have been problematic for the health and well-being of the sellers, as some impressive quantitative work has documented.[11]

Regulated legalisation

One response to these issues would be to say that the problems have been caused by the transactions' illegality or the lack of effective regulation where sale was legal. As we have seen from discussing Friedlaender's argument, that sales are illegal does not mean they will not take place, and the results of this are often dire. And while we can take seriously the idea that organ sale may present problems through the commodification of the person, we need to weigh against this the fact that, to the degree to which it does not take place, people will die. In this situation, there seems to be a strong case for legalisation combined with regulatory measures that aim at reaching the best achievable human outcomes.

In this context, some of the work of American legal scholar Peggy Radin is pertinent. Radin has argued that in situations where problematic transactions are likely to take place whether or not they are legal, there is often a case for regulated legalisation—for what has become known in the literature, as a result of her work, as 'incomplete commodification.'[12] This means, essentially, that the commercial activity is legalised but made subject to regulations of a kind that goes beyond what would be involved in apple sales, for instance.

The most obvious examples that illustrate Radin's approach are in fields such as prostitution and pornography. It is suggested that these are likely to exist whether or not they are legal. But, it is argued, if they are legalised but regulated, a range of benefits will follow. Those working in these fields can obtain legal protection, and we may avoid certain obvious forms of police corruption. Prostitutes and pornographic actors may be subjected to regular health checks to prevent the spread of disease, and measures may be taken that may remove the vulnerable from participation. Also, if a legal market is created, those involved would have a lot to lose should they also undertake illegal activities. One might well expect legitimate operators to inform against competitors that supplied illegal goods and services. A few years ago, a lobbyist for the pornography and brothel industry (who gave a guest lecture to one of my classes) claimed that the legal market for pornography in the ACT had served there to squeeze out the production and sale of violent pornography. I do not know if the lobbyist was correct, but what was said is plausible, not least because the availability of legal material might well have made the unfilled demand for other material relatively small, making it not worth anyone's while to try to supply it commercially, given the various risks involved in illegal production and sale.

Yet there are two problems with all this. The first, as anyone who has seen *The Canberra Times* will note, is that legalisation of these activities leads to their regularisation. There are personal ads for 'adult services' in the newspaper, of a kind that normalises the existence of prostitution and the sale of pornography as part of the ordinary world of anyone living in Canberra. Should kidney sales be legalised, we could well imagine that discreet advertising for the industry would become a regular feature of our day-to-day lives.

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The second problem came to light in Germany, at the time of the recent soccer world cup, where there was controversy about the legalisation of sexual service sales. The problem, it should be said, was from the perspective not of the buyers or sellers of sexual services, but from others concerned with what might be called social externalities that these transactions are claimed to create. Germany has legalised and regulated prostitution. Sweden, influenced by feminist criticism of the toleration of any form of prostitution, was strongly against the German approach, and complained about it. The Swedes thought it served to legitimise things that should simply not be legitimised. There is ongoing controversy in the academic literature about the

pros and cons of these different approaches.[13] But the Swedish stance—which has also been influential elsewhere—suggests an objection to the adoption of the Radin-derived approach not just on sexual services, but in other areas too, including the commodification of persons through live kidney sales. It is argued that there are some things we should just not countenance. But one might again say: while one might say this of commercialised sex, can we of kidney sales? Is it acceptable to take such a view when one recognises that people will die as a result?

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A problem from Iran

The most significant problems for the case for kidney sales are those that have emerged from the literature on Iran, where there is a system for what might be called the quasi-sale of kidneys, which is regulated by the government.[14] This system seems to be shaped by what is judged in Iran to be compliant with sharia law. Essentially, what happens is that people who wish to 'sell' are not paid for the kidney as such, but are given a sum of money by the government, while the person who receives the kidney may also offer the donor a gift. The system has been described in the academic literature on the subject, and *The Economist* referred to it as a model of how such services might work. The problem, though, is that there is evidence that those who have 'sold' seem very unhappy about having done so, and also suffer medical difficulties. Why should there be such difficulties? In the US, those who have given kidneys to a relative seem not to suffer any problems, as is evidenced by the fact that they can obtain health and life insurance without paying a higher premium: the judgement of insurance companies and their actuaries being perhaps the most hard-nosed appraisal that it is possible to obtain.[15]

Problems for those who have sold a kidney in India have also been documented, but those who have done so in most detail have not gone on to explain why the problems occur.[16] Work by the Iranian scholar Javaad Zargooshi has gone behind the quantitative approaches that have been taken to the problems of kidney sale in India.[17]

In qualitative work in Iran, Zargooshi has given us accounts drawn from the experiences of those who have actually sold their kidneys. From examining them, the reasons for the problems become clearer. The key issue is that they were engaged in what their culture takes to be a heavily stigmatised activity. It was a dreadful thing to have sold a kidney, and was so shaming that people tried to conceal it from their spouse, were taunted about it by street urchins, and were excoriated by their families. People who had sold told of their regrets, their nightmares, and so on. But why, then, did people sell? A big problem seems to have been that they were pressured because of debts to moneylenders or to rapacious family members. This brought with it a further problem: those who the money was owed to sometimes denuded the sellers of funds to the point where they could not afford much-needed follow-up treatment. This sometimes meant that sellers were unable to return to former occupations such as arduous unskilled labour. In addition, in some cases promised gifts from those who received the kidneys never materialised.

What is to be done?

What conclusions are we to draw from the Iranian case? It seems to me that the case for regulated legislation stands intact, just because it is not clear that, in the situation that we face—where there are comparatively wealthy people in need of kidneys, and many millions of impoverished would-be sellers—it would be at all easy to prevent kidney sales taking place. Also, because doing so would cause people to die, we should not suppress the sale of kidneys even if we could. That there have been some bad consequences where there has been something like legal sale does not mean that the situation would be better if we simply had a black market for organs (as, ironically, the work of Scheper-Hughes and her colleagues has served to illustrate).

It seems desirable to legalise such markets, but also to surround them with better regulations. There have already been suggestions that Western governments or private charities might enter the market on behalf of those who have few resources, but need kidneys. In the light of the Indian and Iranian cases, it also seems obvious to require that there be inalienable entitlements to follow-up medical services for donors. Indeed, it seems desirable to not only legalise the sale of kidneys, but to encourage a form of certification so that all involved could be sure that donations were voluntary, that medical standards were good, and also that the interests of donors were looked after. There would seem no reason, for example, why donors could not be offered a free transplant in the event of their subsequently suffering from kidney failure themselves: the cost of insurance for this could be documented fairly easily.

Yet, one might question whether governments in some very poor countries—not least because of the risk of corruption—are up to the regulatory tasks that all this would involve. It might therefore be attractive to explore a combination of legalisation and private certification. We could consider using systems like those described in Daniel Klein's collection *Reputation*, where private commercial companies provide certification that the appropriate standards have been complied with.[18] The fact of a service's certification could form part of its advertising to would-be kidney-buyers.

But what of the cultural issues that posed such problems in Iran, and which also seem to have operated in India? A simple remedy would be to include monitoring within the certification process to make sure that there were no significant cultural problems with selling kidneys in the regions from which they were obtained. In addition, there seem to be strong arguments for psychological screening to make sure that donors are reasonably robust. All this could form part of the certification process imposed from within Western countries. Compliance with it, and with associated health standards, could then be made the basis of advertising.

What of those who would be excluded from selling? We face, here, a difficult situation, in the sense that those who sold in India and Iran, and did so badly out of it, were nonetheless desperate to sell. Not allowing them to sell could be argued to make things even worse. I am not sure that argument would be correct: given what we know of the outcomes for people who have sold in such circumstances, I think a measure of paternalism can here be defended, not least because it is not clear that anyone has a moral obligation to make a commercial transaction with anyone else. It is also not clear that those who are heavily in debt to rapacious moneylenders and so on have their situation improved if legalisation of kidney sales allows their creditors to get their hands on one more thing that they can be forced to sell. But if people are moved by the situation of those who are so desperate that they are willing to sell a kidney even where it is deeply problematic for them to do so, there is nothing to stop them from subscribing to or setting up a charity to assist them.

Conclusion

It can still be argued that all this simply sanctions something that, morally, should not be taking place. I agree there is something distasteful about the 'gaze' of the rich person who looks on others as something like collections of alienable body parts. But bear in mind that other pressures bear on potential live donors, that the shortfall in kidney supplies from voluntary donors will be increasingly dire, and that black markets are liable to generate outcomes that are worse than we could expect from legal and regulated or certified markets. In the face of this difficult problem, we would do best to embrace incomplete commodification, and to try to arrange that our regulations or systems of certification deliver the best outcomes possible in difficult circumstances. There remains something morally unattractive about kidney sale and the commodification of the body. But it is far more unattractive for us to let our moral scruples about this condemn others to die from kidney failure, or at best a long period of misery on dialysis.

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